

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

CASE NO.: 1222/2021

Matter heard on: 02 February 2023

Judgement delivered on: 14 February 2023

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3)REVISED

In the matter between: -

ENOCH MGIJIMA LOCAL MUNICIPALITY

First Applicant

MONWABISI SOMANA

Second Applicant

and

ESKOM HOLDINGS SOC LTD

First Respondent

BORDER-KEI CHAMBER OF BUSINESS

Second Respondent

TWIZZA (PTY) LTD

Third Respondent

CRICKLEY DAIRY (PTY) LTD

Fourth Respondent

FARMHOUSE FROZEN FOODS CC

Fifth Respondent

KINGFISHER INDUSTRIES CC

Sixth Respondent

SIGHTFULL 142 CC t/a SHELL ULTRA CITY

Seventh Respondent

JUDGMENT

SMITH J:

[1] During December 2019 the applicant, namely the Enoch Mgijima Local Municipality (the municipality), and Eskom, the first respondent, concluded an 'Acknowledgment of Debt and Payment Plan Agreement' (the settlement agreement) in terms of which it, *inter alia*, acknowledged that it owed Eskom some R265 million in respect of electricity supplied to it. The settlement agreement also provided for a payment plan in terms of which the municipality agreed to settle the debt in instalments, the first having been due on 20 December 2019 and the final instalment on 31 July 2022. On 12 December 2019, an order issued by agreement between the parties, making the settlement agreement an order of court. The order also recorded that Eskom undertook to supply electricity to the municipality in the ordinary course, provided that the municipality complies with the payment agreement.

[2] It is common cause that the municipality has defaulted on the payments due and it now seeks rescission of the order in terms of Uniform Court Rule 42 (1) (c). In terms of that rule the court may vary or rescind an order or judgment granted as a result of a mistake common to the parties. The rule envisages that both parties must be mistaken as to the true facts, or the principles of law, as the case may be. There must also be a causative link between the mistake and the granting of the order. (*Tshivhase Royal Council v Tshivhase* 1992 (4) 852 (A), at 852). The second to

seventh respondents were cited as interested parties and only the municipality opposed the application.

[3] The municipality contends that the mistake that resulted in the court order arose in the following circumstances. It is common cause that during September 2018, Eskom published a notice in the Daily Dispatch newspaper declaring its intention to implement interruption of bulk supply of electricity to the municipality in accordance with published schedules. The municipality contends that it was this unlawful threat that coerced it into concluding the settlement agreement.

[4] The municipality disputes Eskom's entitlement to extract payment on threat of termination of its electricity supply or by way of writ of execution. It contends that its spiralling indebtedness to Eskom was allowed 'by all concerned' to escalate to the point where it is now completely unmanageable. Referring to a writ of execution issued by Eskom on 17 December 2020 and its subsequent attempts to attach and sell by public auction municipal property in order to satisfy the debt, which had by then ballooned to some R457 million, it asserts that such a drastic course of action will have catastrophic consequences for the municipality and all citizens who live and work in it.

[5] On 22 January 2021, the municipality's attorneys wrote to Eskom contesting its entitlement to execute the writ and expressing the view that the municipality's parlous financial position and its resultant inability to settle the debt on the terms demanded by Eskom, 'is an intergovernmental dispute as envisaged in section 41 (3) of the Constitution and section 40 of the Inter-governmental Relations Framework Act, 13 of 2004'. They also expressed the view that the impugned order falls to be rescinded on the ground that the settlement agreement was exacted on the basis of an unlawful threat by Eskom to disconnect the electricity supply to the municipality. In support of this contention they referred to various court cases where Eskom's constitutional and statutory obligations to engage meaningfully with municipalities before terminating electricity supply, were spelled out.

[6] They also demanded that Eskom withdraws the writ of execution in order to engage with the municipality in good faith in terms of section 41 of the Constitution.

In turn, the municipality ‘undertakes to also engage with Eskom in good faith and in compliance with its constitutional and statutory obligations.’

[7] The contended common mistake relied upon by the municipality relates to the question whether the judgment was obtained as a consequence of an unlawful threat by Eskom to disconnect its electricity supply. Relying on the Supreme Court of Appeal judgment in *Eskom Holdings Soc Ltd v Resilient Properties (Pty) Ltd and Others* 2021 (3) SA 47 (SCA) (*Resilient*), it contends that Eskom’s threat to interrupt its electricity supply without following the prescribed statutory procedures, was unlawful. The Court held in that case that Eskom was obliged to comply with the dispute resolution provisions contained in the Inter-governmental Relations Framework Act, 13 of 2004 (the IRFA), despite the fact that there were no real disputes regarding the existence of the debt or the municipality’s inability to pay. The Court held furthermore that there nevertheless remained a ‘live dispute’ between the parties ‘as to how the debt would be liquidated and the remedies available to Eskom in the event of default’ and that it did not assist Eskom to rely on an acknowledgement of debt. (See also the majority judgment of Madlanga J in *Eskom Holdings Soc Ltd v Vaal River Development Association Ltd and Others* [2022] ZACC 44)

[8] Mr *Buchanan* SC, who appeared for the municipality, submitted that at the time the court order was consented to, the judgments of the Supreme Court of Appeal relating to Eskom’s rights and obligations had not yet been handed down and the order was thus obtained on the basis of erroneous assumptions as to what the legal position was at the time. He argued that the evidence establishes that both Eskom and the municipality acted on the honest – albeit mistaken – belief that Eskom was entitled to threaten disconnection of the electricity supply in order to exact the settlement agreement. There therefore existed a fundamental common mistake as to the underlying legal position, within the meaning of rule 42 (1) (c), or so the argument went.

[9] Mr *Shangisa* SC, who together with Ms *Rakgwale* appeared for Eskom, submitted that there is no legal basis for the contention that an order of court is a dispute that must be referred for further negotiations within the meaning of the IRFA.

It would offend the fundamental principle of the finality of court orders if they are rescinded on the basis that some further negotiations are warranted. Any negotiations aimed at achieving a resolution of the dispute must be undertaken before the court order is granted and not thereafter. This is so because court orders constitute the final pronouncement of a competent courts on a *lis* between the parties.

[10] He argued furthermore that the facts of this case can be distinguished from those in *Resilient*. In the latter case the issue which fell for decision related to Eskom's decision to interrupt or terminate electricity supply to a delinquent municipality without complying with the provisions of the IRFA. He submitted that the facts in *Eskom Holdings Soc v Letsemeng Local Municipality and Others 2*, All SA 347 (SCA) are on fours with those in this case. In the latter case the Supreme Court of Appeal held that there is nothing wrong with a delinquent municipality consenting to an acknowledgement of debt or monetary order, the terms of which have been mutually agreed to between it and Eskom. Such a judgment is binding and may not be rescinded on the ground that it was unlawfully obtained. The Court thus endorsed Eskom's entitlement to enforce payment on account of a monetary order or acknowledgment of debt.

[11] He submitted that, in any event, the assertion that the legal principle entitling a municipality to interdict a threatened interruption of its electricity supply by Eskom was first enunciated in *Resilient*, is incorrect. On the contrary, there is a plethora of cases that were decided before *Resilient* where interdicts were granted prohibiting Eskom from terminating, reducing or interrupting the supply of electricity to delinquent municipalities, subject to its right to compel payment.

[12] He argued that the legal position before *Resilient* was consequently that (a) a municipality who was aggrieved by Eskom's decision to interrupt its electricity supply was entitled to apply for a prohibitory interdict against Eskom, in which event, (b) Eskom was entitled to compel payment, which was usually achieved through relief sought way of a counter-application, an acknowledgment of debt, or a court order consented to by the municipality. He submitted that Eskom has in any event complied with the provisions of the IRFA in that it has, since January 2021,

attempted to assist the municipality with managing its affairs. Eskom has since then repeatedly invited the municipality to declare a dispute in terms of the IRFA, but to no avail.

[13] Before I turn to consider the arguments advanced on behalf of the parties, it is perhaps necessary to mention that Eskom has made it clear that it has no intention of disconnecting or terminating the municipality's electricity supply in order to exact payment of the outstanding debt. It is instead asserting its right to hold the municipality to the terms of the court order and, if necessary, to execute on it.

[14] The municipality's assertion that the order was granted in error is based on the following suppositions. At the time when Eskom published its intention to interrupt its electricity supply in accordance with the stated schedule, the judgment in *Resilient* had not yet been delivered. The municipality was consequently not aware of the principle enunciated in that case regarding Eskom's constitutional and statutory obligations before it can disconnect the electricity supply of delinquent municipalities. It was thus of the erroneous belief that it had no legal remedy to resist that threat and was consequently browbeaten into concluding the settlement agreement in order to avoid the calamitous consequences that would have flowed if Eskom had followed through on its threat. Its decision to consent to judgment was accordingly informed by its erroneous understanding of the law. The municipality contends that Eskom laboured under the same misapprehension. This much is evident from the fact that it appeared to believe that it was entitled, in terms of the law, to threaten termination or disconnection of electricity in order to extract payment from defaulting municipalities, hence the publication of its intention to interrupt the municipality's electricity supply, or so the argument went.

[15] The difficulty with this argument, as Mr *Shangisa* has correctly submitted, is that it is a matter of public record that courts (in this division and elsewhere in the country) have issued interdicts against Eskom prohibiting it from disconnecting electricity supply to defaulting municipality's without following proper procedures long before *Resilient* was decided. While the Court in *Resilient* may since have pronounced authoritatively on the issue, it is not correct to suggest that municipalities have not found sanctuary in the remedy of interdictory relief before *Resilient*. And

even if the municipality had been labouring under this erroneous understanding of the law, it is indisputable that Eskom has had to defend numerous such applications by desperate municipalities before *Resilient*, some of them having been brought in this Court. Thus even if the municipality was motivated by this erroneous understanding of the law, the same cannot be said of Eskom. The mistake was therefore not common to the parties.

[16] There is, moreover, another reason why the application must fail, and it is this. I do not believe that there is any causal connection between the contended mistake and the granting of the order. It is common cause that the municipality was indebted to Eskom to the extent of the amount acknowledged in the settlement agreement. It was therefore in its best interests to negotiate for repayment terms which it believed – at least at the time - it could afford, otherwise Eskom would have been entitled to claim the full outstanding debt. The fact that it has consented to the settlement agreement being made an order of court was also inconsequential, since Eskom would in any event have been entitled to obtain judgment on the basis thereof.

[17] The stark reality for the municipality is that rescission of the impugned order will in any event not change the fact that it owes Eskom an astronomical sum of money, and more ominously, that the debt seems to continue growing exponentially by the month. The order it seeks in this matter, while it may have allowed some temporary reprieve, is therefore, in any event, not the solution to its daunting problem.

[18] Having said this, one cannot help but ponder what the judgment of this Court will mean for both parties. The municipality is understandably concerned about Eskom's entitlement to attach and sell municipal assets pursuant to the order. It is not difficult to conceive of the disastrous consequences that such a course of action will have for those unfortunate citizens who live and work within its boundaries. Moreover, there can be little doubt that execution will be a pyrrhic victory for Eskom, who is likely to recover only a miniscule amount that will hardly make a dent in the municipality's astronomical debt. In addition, the remedy of contempt of court proceedings is also likely to yield only limited results. To my mind, the key to the resolution of this daunting dilemma lies within the hands of the parties. It is only they

who, perhaps with the assistance of other organs of state, can work out a solution that will be mutually beneficial and allow the municipality to commit to a sustainable payment plan that will enable it to settle the debt within a reasonable time. The renegotiated terms of payment can then hopefully be reinforced through an agreed variation of the court order. At the hearing of the matter I have requested the parties to consider the possibility of such an arrangement, but Eskom declined the opportunity, perhaps because it was understandably concerned about losing the advantage guaranteed by the existence of the court order. Now that it has the assurance that the court order will remain extant, one hopes that it will reconsider its position regarding this possibility. However, there can be little doubt that any attempt to resolve the impasse on this basis will depend to great extent on the municipality's commitment to accountable governance and to carry out its constitutional obligations. It must also commit to strict adherence to the peremptory terms of the Electricity Regulation Act, 4 of 2006, which, amongst others, enjoin it to ring-fence and keep separate financial accounts of its electricity reticulation business. I am, for obvious reasons, not at liberty to make any orders in this regard, be it structural or otherwise, and my comments are driven only by the earnest hope that a solution will be devised for this formidable problem faced by so many municipalities across the country. But, in the final analysis, it is my judicial function to pronounce on the current *lis* between the parties.

[19] I am, for the reasons explained above, of the view that the municipality failed to establish that the impugned court order was granted as a result of a mistake common to the parties. In the result the following order issues:

- (a) The application is dismissed with costs, including those costs occasioned by the employment of two counsel.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

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